Supreme Court, U.S.
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No. 95-1408

In The

Supreme Court of the United States

October Term, 1995

CANDY SADDLER CARTER,

Petitioner,

v.

MONTANA DEPARTMENT OF TRANSPORTATION
and
STATE OF MONTANA,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Montana

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does an Indian retailer have standing – without joining the distributor or her Tribe – to allege that the State's privilege tax on distributors' sales transactions of gasoline is preempted by federal law especially in regard to the Indian trader statutes, 25 U.S.C. §§ 261-264?

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OPINION BELOW

The opinion of the Montana Supreme Court is reported at *Carter v. Montana Department of Transportation*, 905 P.2d 1102 (1995) (Pet. App. 9a-14a.)

RELEVANT STATUTORY PROVISIONS

15-70-201 [1991]. Definitions. As used in this part, unless the context requires otherwise, the following definitions apply:

. . . .

(5)(b) Gasoline imported into this state, other than that gasoline placed in storage at refineries or pipeline terminals, shall be deemed to be "distributed" after it has arrived in and is brought to rest in this state.

(6) "Distributor" means: (a) any person who engages in the business in this state of producing, refining, manufacturing, or compounding gasoline for sale, use, or distribution;

(b) any person who imports gasoline for sale, use, or distribution;

(c) any person who engages in the wholesale distribution of gasoline in this state and chooses to become licensed to assume the Montana state gasoline tax liability;

(d) any exporter as defined in subsection (8);

(e) any dealer licensed as of January 1, 1969, except a dealer at an established airport;

(f) any person in Montana who blends alcohol with gasoline.

. . . .

(8) "Exporter" means any person who transports, other than in the fuel supply tank of a motor vehicle, gasoline received from a refinery or pipeline terminal in Montana to a destination outside Montana for sale, use, or consumption beyond the boundaries of this state.

. . . .

(10) "Import" includes and means to receive into any person's possession or custody first after its arrival and coming to rest at destination within the state of any gasoline shipped or transported into this state from point of origin without this state other than in the fuel supply tank of a motor vehicle.

15-70-203 [1991]. License to sell gasoline on which refund may be claimed. (1) Any person other than a licensed distributor shall obtain a license from the department of transportation prior to selling gasoline on which a refund may be claimed. The application for license shall contain the applicant's name, address, place or places of business in the state of Montana, and other information which may be required by the department. Licenses issued shall bear a license number and the date of issuance. The department shall keep a record of all licenses issued, canceled, or suspended. A nontransferable license shall be issued and be effective until canceled or suspended by the department.

(2) Any person failing to comply with this section shall be subject to a fine of not less than

$25 or more than $200 or imprisonment in the county jail for a period not less than 10 days or more than 60 days or both fine and imprisonment.

15-70-204 [1991]. Gasoline license tax – rate. (1) Every distributor shall pay to the department of transportation a license tax for the privilege of engaging in and carrying on business in this state in an amount equal to 1 cent for each gallon of aviation gasoline, which shall be allocated to the department of transportation as provided by 67-1-301, as amended, and 20 cents for each gallon of all other gasoline distributed by him within the state and upon which the gasoline license tax has not been paid by any other distributor.

(2) Gasoline exported shall not be included in the measure of the distributor's license tax.

(3) Alcohol that is blended or is to be blended with gasoline to be sold as gasohol is subject to a tax per gallon equal to the license tax imposed on nonaviation gasoline distributors under subsection (1).

STATEMENT OF THE CASE

In 1992, Petitioner, a gasoline filling station retailer, filed a complaint against respondents Montana Department of Transportation and State of Montana, seeking a declaratory judgment that Montana was without authority to tax any gasoline distributor sales to on-reservation Indian retailers and monetary reimbursement for taxes apparently paid by the distributor from whom she buys

her gasoline. Aside from disputing Petitioner's position concerning the substantive issues of whether the Hayden-Cartwright Act, Pub. L. No. 74-686, 49 Stat. 1521 (1936) (codified as amended at 4 U.S.C. § 104(a)) was an express congressional authorization for states to tax the sale of gasoline on Indian reservations and whether the Indian trader statutes, 25 U.S.C. §§ 261-264, preempted and prohibited any state regulation which impacted on-reservation trade, Respondents contested her standing to challenge the tax's validity. The district court dismissed the complaint because, under Mont. Code Ann. § 15-70-204 (1991), the legal incidence of the tax fell on gasoline distributors, not retailers like Petitioner. The merits of her claim therefore were not addressed. (Pet. App. 5a-7a.)

Petitioner appealed to the Montana Supreme Court. Like the district court, it resolved the challenge on the basis of standing and did not address the merits of her claim. The Supreme Court reasoned that the dispositive language in Montana's statute clearly places the burden on the distributor and that Petitioner was unable to show that she has been personally affected by this tax. (Pet. App. 14a.)

Petitioner thus incorrectly asserts that "[b]oth courts did not address Petitioner's fundamental assertion that she had standing to assert that the state had no tax jurisdiction over her." (Pet. 5.) Both courts obviously did address standing, ruling against her on the issue. Since the only tax at issue was that imposed under § 15-70-204, any other tax jurisdiction was hypothetical. Montana courts, like their federal counterparts, do not resolve hypothetical disputes. *E.g., Olson v. Department of Revenue*, 726 P.2d 1162, 1166 (Mont. 1986) (applying federal

justiciability standards under Article VII, section 4 of the Montana Constitution).

REASONS CERTIORARI SHOULD NOT BE GRANTED

This Case Meets None of the Criteria for Review on Certiorari.

Rule 10.1 of this Court provides that review will be granted "only when there are special and important reasons therefor." Two of the considerations are whether the highest court of a State has decided a federal question in a way that conflicts with the highest court of another state or a United States court of appeals, and whether a state's highest court has decided an important federal question in a way that conflicts with applicable decisions of this Court. Petitioner alleges these factors exist and that review is appropriate. (Pet. 7, 10, 11.)

This case does not present any of these considerations. It does not involve a decision on a matter of federal law which conflicts with rulings of this Court, a United States court of appeals, or another state's highest court or present an important federal question which should be, but has not been, determined by this Court.

A. No Conflict Exists With Respect to the Standing Principles on Which the Decision Below Was Determined.

The cases Petitioner cites in support of her contention that a conflict over applicable standing principles exists

have nothing to do with standing. They instead deal with substantive issues of Indian taxation; i.e., they involve without exception the preemptive effect of the Indian trader statutes, 25 U.S.C. §§ 261-264, on commercial transactions with Indians on their reservations.

Herzog Brothers Trucking v. State Tax Commission, 508 N.E.2d 914 (N.Y. 1987), *vacated*, 487 U.S. 1212, *on remand*, 533 N.E.2d 255 (N.Y. 1988), did not implicate standing questions, but rather the scope of federal Indian trader statutes' preemption of state taxation of on-reservation trade with Indians. Similarly, *White Eagle v. Dorgan*, 209 N.W.2d 621 (N.D. 1973), addressed state taxation of on-reservation commerce conducted by Indians on their own reservations. The plaintiffs were Indian traders and were the very persons from whom the state sought to collect the taxes in issue. The court therefore ruled on the substantive questions of preemption and taxation without addressing standing. In *Laguna Industries, Inc. v. New Mexico Taxation & Revenue Department*, 845 P.2d 167 (N.M. Ct. App. 1992), *aff'd*, 855 P.2d 127 (N.M. 1993), the court held that prior case law holding Indian trader statutes preempted imposition of state taxes upon on-reservation transactions with Indians applied to the services in issue, i.e., the preemption rule was not limited to transactions involving goods. Again, standing was not in issue.

Similarly, in *State ex rel. Department of Revenue v. Dillon*, 826 P.2d 1186 (Ariz. Ct. App. 1991), the issue was not standing, but whether the state could tax an enrolled member of a Washington tribe on sales he made on a reservation in Arizona to nontribal members of the Arizona tribe on whose reservation the sales were made. The

court there applied the reasoning of *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), and found the taxes valid with respect to sales to non-Indians. Again, the incidence fell on the party before the court and standing was not in issue. Lastly, in *Mahone v. State Tax Commission*, 524 P.2d 187 (Idaho), *cert. denied*, 419 U.S. 1089 (1974), the plaintiff was the taxpayer. In that case, as in the others cited by Petitioner, standing was not at issue.

Indeed, the question whether there is conflicting authority on the issue of standing is answered by Petitioner's own admission when informing "this Court at the outset that her counsel has found no precedent in case law dealing with gasoline taxes where an Indian retailer (and tribal member) was the sole plaintiff seeking relief." (Pet. 8.) Her admission is wholly incompatible with the claim that, in some fashion, the Montana Supreme Court's decision creates a conflict of authority warranting this Court's attention.

B. No Substantial Federal Question Is Presented by the Decision Below.

Petitioner's claim that this case has national implications and that granting certiorari herein will clarify confusion over the scope of standing to challenge state taxes based on preemption by the Indian trader statutes is farfetched. None of the cases relevant here to the underlying substantive issue has recognized that a nontaxpayer may challenge a tax assessed on another where the party actually taxed has not joined in the challenge.

Petitioner instead seeks a sweeping pronouncement concerning "the legal rights of all interested parties,"

here apparently unnamed tribal members wishing to avoid what they believe is the economic incidence of Montana's gasoline tax. (Pet. 20.) The notion, however, that only distributors have standing to challenge the propriety of taxing gasoline sold on reservations to members of the resident tribe or the tribe itself is unremarkable and embodies no misapprehension of federal justiciability principles. "When a plaintiff's standing is brought into issue the relevant inquiry is whether . . . the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976). Here, it is the distributor, not the retailer, whose legal interest is affected by the gasoline tax, and it is the distributor, not the retailer, which must challenge the tax's validity with respect to amounts delivered to Indian reservations for sale.

Petitioner cites no authority for the proposition, and none exists, that she may stand in the shoes of her distributor for the purpose of contesting the tax. The lack of such authority is not happenstance. A contrary conclusion would have the effect of scrapping established federal taxpayer-standing rules and opening state courts which, like Montana, follow federal justiciability principles when determining standing questions under their own state constitutions, to myriad third-party tax contests where the only actual injury-in-fact alleged is the economic harm associated with the pass-through of a tax to the ultimate consumer or to intermediate retailers like Petitioner. "The injury alleged must be personal to the plaintiff, as distinguished from an injury suffered by the community in general. *Warth v. Seldin*, 422 U.S. 490, 95 S. Ct. 2197 (1975)." Such an expansion of federal standing

additionally would have the practical effect of expanding federal court litigation over state taxes since, to the extent state courts chose not to adopt liberalized federal standing standards, nontaxpayer plaintiffs could, and undoubtedly would, argue that "a plain, speedy and efficient remedy" within the state courts did not exist for purposes of applying the jurisdictional bar in 28 U.S.C. § 1341. Petitioner's proposed rule thus could have the anomalous result of giving nontaxpayers access to federal district courts when the actual taxpayer has none.

C. The Merits of Petitioner's Claim Are Not Before This Court.

Petitioner alleges that, "[b]y granting certiorari . . . , the Court will resolve the important but unanswered question as to whether or not the Hayden-Cartwright Act expressly authorizes States to tax motor fuels sales on Indian reservations." (Pet. 16.) This Court should not resolve that issue because the question here is standing, not whether the tax may be assessed against off-reservation distributors. There is no ruling below on this point for this Court to review. This Court should adhere to its usual rule that it will not address issues not resolved below. *Oklahoma State Tax Comm'n v. Chickasaw*, ___ U.S. ___, 115 S. Ct. 2214 (1995).

CONCLUSION

The petition for certiorari should be denied.

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